contends that this is the more convenient interpretation. Bearing in mind the fact that this section creates a criminal offence, I would consider that if a person is to be brought within its scope it must be without ambiguity, and if there is ambiguity it must be interpreted in favour of the accused. Actually I do not consider that there is any ambiguity. I think that the section is not patient of the interpretation sought to be put on it by the Prosecution.

I find the accused not guilty accordingly.

Accused acquitted.

[APPELLATE CIVIL JURISDICTION]

McELWAINE, C.J. (S.S.), TERRELL, J.A. & CUSSEN, J.

May 23, 1940.

V.V.D.N. SOCKALINGAM CHETTIAR AND TWO OTHERS

(Defendants-Appellants)

vs.

K.R.P.R.S.M. SOMASUNDARAM CHETTIAR

(Plaintiff-Respondent).

[SELANGOR CIVIL APPEAL No. 4 of 1940]

Civil Procedure Code (Cap. 7), sections 78, 80, 127 and 128—1932 Rule No. 1, sub-rules 34, 35, 36 and 40—Ex parte decree—Decree in default of appearance—Estoppel by record—Setting aside decree —Service by posting—Notice of proceedings—Constructive service.

The defendants (appellants) resided in India. On the 8th August, 1939, at the instance of the plaintiff (respondent) the Registrar ordered that leave be granted to issue summonses, together with copies of the plaint and of the order, upon the defendants out of the Federated Malay States. The documents were sent to the Subordinate Judge at Devakottai, and on the 5th November, 1939, the process-server posted the same on the outer doors of the defendants' houses. The summonses required appearance to be entered within 42 days from the date of service. The affidavit of posting by the process-server was returned to the Registry at Kuala Lumpur, but there was no endorsement of due service under section 86 of the Civil Procedure Code.

No appearance was entered and on the 10th January, 1940, the plaintiff applied for judgment in default of appearance. At the hearing of the application counsel appeared for the defendants. He stated that he had that very day been instructed: he was not in a position to contest the application: and he asked for a postponement. Counsel for the plaintiff opposed a postponement and stated that it would be open to the defendants to apply to set aside the decree under sub-rule 40 of 1932 Rule No. 1. The Judge (Gordon-Smith, J.), gave "Order as prayed" and the formal decree contained the words "Upon hearing" counsel for the defendants and recited the fact that a certificate of non-appearance had been read.

Upon the defendants moving to set aside the decree:

Held, (Poyser, C.J.), that the decree is conclusive and is not **ex parte** but **inter partes.** There was in fact an appearance on behalf of the defendants. Neither sections 127 and 128 of the Civil Procedure Code nor sub-rule 40 of the Rules are applicable and it is not competent to set aside the judgment thereunder. No opinion was expressed on the merits of the motion, which was dismissed without prejudice to any application by the defendants to apply for leave to appeal out of time or obtain other relief.

Held (on appeal), that the decree is only part of the record. If the record is examined it is clear that the application is for a judgment in default, that no evidence was called and that the defendants had entered no appearance and presented no argument. The recital of reading a certificate of non-appearance negatives the suggestion that the defendants were properly before the Court. The actual order made was "Order as prayed" and to know what was prayed one must look at the record from which it appears that the summons prays for judgment in default of appearance.

Held further, that there was no order for substituted service; section 78 of the Civil Procedure Code is merely directory; by reason of section 80 "posting" becomes good service only if the Court so declares. In making such declaration the Court will consider whether the defendants have received notice of the proceedings.

Cases referred to:—

(1) *In re a Judgment Debtor* (1937) 1 Ch. 137.

(2) *Porter v. Freudenberg* (1915) 1 K.B. 857.

(3) *Re De Cespedes* (1937) 2 A.E.R. 572; 156 L.T. 471.

(4) *Boyle v. Sacker* 39 Ch. D. 249.

(5) *Redditch Benefit Building Society v. Roberts* (1940) 1 A.E.R. 342.

W. G. W. Hastings and M. N. Cumarasami for defendants.

E. D. Shearn for plaintiff.

Poyser, C.J.—This is a motion to set aside the following decree entered by this Court on the 15th day of January, 1940, viz:

> "Upon hearing **Mr. V. Mackie** of counsel for the plaintiff and **Mr. M. N. Cumarasami** of counsel for the 1st, 2nd and 3rd defendants, and upon reading the summons for judgment dated the 10th day of January, 1940, the certificate of non-appearance dated the 10th day of January, 1940, and the affidavit affirmed by KR. PR. PL. SM. Somasundaram Chettiar on the 9th day of January, 1940, IT IS ORDERED that each of the 1st, 2nd and 3rd defendants do pay to the plaintiff and the 4th defendant the sum of $7,848.55 with interest on such sums from the 12th day of February, 1939, until payment at the Chettiar current account rate prevailing in Kuala Lumpur. AND it is ordered that the one-fifth beneficial interest of the 1st, 2nd and 3rd defendants in the following lands or so many of them as shall be necessary to realise the said three sums of $7,848.55 interest and costs, be sold by public auction under the directions of the Court namely the lands held under Selangor Grants Nos. 2971, 2972, 3184, 3185, 3186, 3241, 3242, 3977, 3981, 3982, 4244, 4557, 4729, 4730, 4731, 4732,

4733, 4736, 4737, 4739 and 5056; Selangor Grant No. 5304; Perak Grants Nos. 7845 and 9423; and Peretak Mukim Mining Leases Nos. 3736, 3737 and 3766, AND it is also ordered that the 1st, 2nd and 3rd defendants do pay the costs of the plaintiff as taxed by the officer of the Court."

The affidavit in support of the motion set out, *inter alia,* that the copy of the summons and plaint in the suit were not received by the 1st, 2nd and 3rd defendants until the 13th of December, 1939, that on the following day they applied by cable to the Registrar for an adjournment which was refused, and that they then instructed *Mr. Cumarasami* to appear for them, but the latter only received such instructions on the 15th January, 1940. *Mr. Cumarasami* did appear before Gordon-Smith, J., on the 15th of January and, apparently, asked for an adjournment which the Judge refused. No formal appearance has been entered by or on behalf of the defendants at any time.

Mr. Hastings, in support of the motion, relied on *Redditch Benefit Building Society v. Roberts*[5]. In that case the Court of Appeal held that judgment ought not to be entered in default of appearance when the defendant is before the Court, and whether he has technically appeared or not, is present and anxious to put himself in a position to defend the action —(this case was not decided when Gordon-Smith, J., entered judgment for the plaintiff).

Mr. Hastings argued that the judgment purports to be a judgment in default of appearance, and sets out that a certificate of non-appearance was filed. The fact, however, remains that there was an appearance on behalf of the defendants, and that being the case, I think the remedy of the defendants, if any, is by way of an appeal to the Court of Appeal.

The motion, therefore, will be dismissed, but such dismissal will be without prejudice to any application by the defendants to the Court of Appeal to appeal out of time or obtain other relief.

I should also state that I did not hear *Mr. Shearn* on the merits, and express no opinion as to whether the decree should or should not be set aside. I only express the opinion that, sitting by myself, I have no power to set it aside.

The motion is accordingly dismissed with costs.

B. J. P. Joaquim and M. N. Cumarasami for appellants (defendants).

E. D. Shearn for respondent (plaintiff).

McElwaine, C.J.—On the 31st July, 1939, the respondent filed a statement of plaint against the appellants and two others in which he claimed $23,545.67 seeking to hold each of the appellants liable for one-third of that sum. He also claimed other relief.

At all material times the appellants were resident at known addresses in India.

On the 8th August, 1939, an order (a copy of which was not included in the record) was made for the service of that order, the summons and the plaint on the appellants out of the jurisdiction. This order did not provide for substituted service.

The process-server of the Court of the Subordinate Judge, Devakottai, India, first attempted to serve the defendants on or about the 29th August, 1939. He stated in his affidavit that he enquired for the defendants and was told they had gone away a few days previously and that he therefore served them by affixing the summons and Court orders on their doors. He did not mention their address or their Kallal. That service was admittedly bad as the plaint was not affixed to the doors.

A similar defect in service was made in a further attempt to serve the documents on the 29th October. Finally, on the 5th November, 1939, the process-server being informed that the then defendants were absent at Sivapuri affixed copies of the summons, orders and plaint on the outer doors of the defendants' houses.

In an affidavit the first appellant swore that he was in his house at Kallal during the whole of August and that he attended an adoption ceremony which commenced on the 27th August and that no summons or order was affixed on his door.

Another person affirmed an affidavit to the effect that he saw the first appellant in Kallal at the end of August at adoption ceremonies that lasted five days.

In another affidavit, Sockalingam stated that he left home on the 2nd November, 1939, to go on pilgrimage and only became aware of the proceedings on his return on the 13th December, 1939.

He had forty-two days within which to enter an appearance.

On the 10th January, 1940, the respondent took out a summons for judgment "in default of appearance" returnable on the 15th January. It was noted on this summons that it "is not intended to be served on anyone".

There were Government restrictions on the appellants leaving India. On the morning of the 15th January, *Mr. Cumarasami* received a letter retaining him for the defence. He became aware of the summons for judgment and appeared before the Judge in Chambers to ask for an adjournment. This was refused. The learned Judge on hearing *Mr. Mackie* for the plaintiff and upon reading the certificate of non-appearance made an order as prayed. That order was clearly an order for judgment in default of appearance. The order as drawn up commenced "Upon hearing *Mr. V. Mackie* of counsel for the plaintiff and *Mr. M. N. Cumarasami* of counsel for the 1st, 2nd and 3rd defendants AND upon reading the summons for judgment dated the 10th day of January, 1940, the certificate of non-appearance dated the 10th day of January, 1940..... It is ordered".

On the 4th March, a notice was filed asking for an order setting aside the order of Mr. Justice Gordon-Smith and that the time for entering appearance be extended. The motion was heard by Poyser, C.J., Federated Malay States, who held that he had no power to set the decree aside as in his view "the decree is not *ex parte* but *inter partes* as appears from the first two lines of it. The decree is on this point conclusive (*see Hailsham* Vol. 13, 686), and there is no judgment in the case to consider, assuming that it could be considered, in conjunction with the decree".

With great respect I am unable to agree. In the first place the decree recites that no appearance had been entered. Therefore when it says "Upon hearing *Mr. Cumarasami*" it refers to a solicitor who was not on the record. The actual order made by the Judge was "Order as prayed" and to know what was prayed one must look at the record where one finds the summons praying for judgment in default of appearance.

On the 1st May, Gordon-Smith, J., gave written grounds for his decision. These were not before Poyser, C.J. Gordon-Smith, J., said "No appearance had been entered and the plaintiff was entitled to ask for judgment by default and in my opinion, no substantial grounds for not having entered an appearance were put forward. I therefore made an order accordingly". It is not necessary to refer to the rest of this short judgment.

I am clearly of opinion that the proceedings were *ex parte*.

If the formal decree itself does not make that plain, one can examine the judgment because section 222 of the Civil Procedure Code says that the decree shall agree with the judgment and the judgment is "Order as prayed" on a summons for judgment in default of appearance.

The appellant swore an affidavit that he had two defences, one that the debt was paid, the other limitation.

When *Mr. Cumarasami* appeared before Gordon-Smith, J., he had just that day been retained and I see no reason to think that he was acquainted with the case or in any way able to assist the Judge.

In my opinion this being a default judgment Poyser, C.J., had power to set it aside under section 127 of the Civil Procedure Code and Rule 40 of the Rule Committee Rules of 1932, and I think the order should be set aside.

The appellant also claims that he is entitled *ex debito justitiæ* to have the order set aside as it was made within forty-two days of the 13th December, the date on which he first became aware of the action, and therefore before the time for appearance expired.

It is quite clear from the process-server's affidavit that on the 5th November, there was no personal service and there is nothing to contradict the appellant's affidavit, saying that he first became aware of the action on the 13th December.

No order for substituted service was made. Section 78 of the Civil Procedure Code provides that when the serving officer after using all due diligence cannot find the defendant he shall affix a copy of the summons on the outer door of the defendant's house and shall then return the original to the Court from which it issued with a return endorsed thereon or annexed stating that he so affixed the copy.

Such fixing (even if it extends to plaints and orders for service *ex jure*) has not necessarily the effect of creating *ex post facto* an order for substituted service.

Section 80 provides that the Court after enquiring shall either declare that the summons has been duly served or order such service as it thinks fit.

It is fundamental that a person should have notice of proceedings against him and even when an order for substituted service has been made a judgment can, I think, be set aside, when merits are disclosed and when the Court is satisfied that the defendant

was not aware of the proceedings and was not avoiding service which is tantamount to knowledge of the proceedings. *In re a Judgment Debtor*[1]; *Porter v. Freudenberg*[2]; *Re De Cespedes*[3].

In my opinion service was not effected until 13th December and judgment was wrongly entered before the expiration of forty-two days from that date, and therefore before the time for appearing had expired.

I would allow the appeal and set aside the orders of Poyser, C.J., and of the Gordon-Smith, J., on the entering of an appearance by the appellant within three days of the taking out of the order of the Court of Appeal.

I would allow the appellant the costs of this appeal and of the proceedings before Poyser, C.J., setting off the costs of the motion for judgment before Gordon-Smith, J., if these costs have not been paid.

I would make no order as to costs on the motion to extend the time of appealing to the Court of Appeal against the decision of Gordon-Smith, J., and I would make no order as to costs in Civil Appeal 5 of 1940 against the decision of Gordon-Smith, J.

The deposits lodged in Court in connection with these appeals should be repaid to the appellant or his solicitor.

Terrell, J.A.—The plaint in this suit was filed on the 31st July, 1939. The first three defendants (the present appellants) were living in India, and on the 8th August, 1939, an order was made that leave be granted to issue summonses for service together with copies of the plaint and of the order on the appellants out of the Federated Malay States. It was further ordered that the said documents be sent by post to the District Judge at Ramnad for the purpose of being served on the appellants at Kallal, Ramnad District, South India. This order was presumably made under the provisions of sections 64 to 67 of the Civil Procedure Code, the procedure for service in India being regulated by section 86.

The documents appear to have been sent, not to the District Judge at Ramnad but to the Subordinate Judge at Devakottai. After certain difficulties the process-server of the Court at Devakottai, being unable to serve the appellants personally, affixed copies of the relevant documents to the outer door of the appellants' houses on the 5th November, 1939. The time limited for entering an appearance was 42 days from the date of service.

No appearance was entered and the plaintiff applied, on the 10th January, 1940, under the provisions of Rule 1 sub-rules 34 to 38 for judgment in default of appearance. The application was supported by an affidavit of the plaintiff sworn on the 9th January, 1940, and a certificate of non-appearance dated the 10th January, 1940. The certificate of non-appearance reads as follows:

> "The summons to appear herein having been duly served on the defendants firstly, secondly and thirdly abovenamed on the 5th day of November, 1939, as appears by the affidavit of S. Alagrisami Mudaly son of Subramaniam Mudaliar, affirmed on the 7th day of November, 1939, and filed herein and the cable from the defendant firstly abovenamed received on the 14th day of December, 1939, and filed herein.
>
> It is hereby certified that no appearances have been entered for the said defendants."

The application was heard before Gordon-Smith, J., on the 15th January, 1940. The appellants had in the meantime appointed *Mr. Cumarasami* as their solicitor. He received his authority on the 15th January, 1940, the very day that the summons was heard, and although he had not entered any formal appearance, he attended in Chambers, and asked for a postponement. He was not in a position then to contest the application, and apart from his request for an adjournment, took no part in the proceedings. The request for an adjournment was refused, and judgment entered in favour of the plaintiff. The order of Gordon-Smith, J., was clearly on the basis that service by posting on the door was good service, otherwise there would have been no jurisdiction to make the order at all. It appears from the learned Judge's notes of argument that *Mr. Mackie* who was then the solicitor for the plaintiff, submitted that he was entitled to judgment under sub-rule 34, but added that if judgment were given, the defendants could apply under sub-rule 40 to set it aside. There can be no question, therefore, that the judgment sought to be obtained was a default judgment, and that the plaintiff's solicitor fully recognised that an application could subsequently be made under sub-rule 40 to set such judgment aside upon such terms as might be just.

The order of Gordon-Smith, J., reads as follows:—

> "Upon hearing **Mr. V. Mackie** of counsel for the plaintiff and **Mr. M. N. Cumarasami** of counsel for the 1st, 2nd and 3rd defendants, and upon reading the summons for judgment dated the 10th day of January, 1940, the certificate of non-appearance dated the 10th day of January, 1940, and the affidavit affirmed by KR. PR. PL. SM. Somasundaram Chettiar on the 9th day of January, 1940, IT IS ORDERED that each of the 1st, 2nd and 3rd defendants do pay to the plaintiff and the 4th defendant the sum of $7,848.55 with interest on such sums from the 12th day of February,

1939, until payment at the Chettiar current account rate prevailing in Kuala Lumpur. AND it is ordered that the one-fifth beneficial interest of the 1st, 2nd and 3rd defendants in the following lands or so many of them as shall be necessary to realise the said three sums of $7,848.55 interest and costs, be sold by public auction under the directions of the Court namely the lands held under Selangor Grants Nos. 2971, 2972, 3184, 3185, 3186, 3241, 3242, 3977, 3981, 3982, 4244, 4557, 4729, 4730, 4731, 4732, 4733, 4736, 4737, 4739 and 5056; Selangor Grant No. 5304; Perak Grants Nos. 7845 and 9423; and Peretak Mukim Mining Leases Nos. 3736; 3737 and 3766, AND it is also ordered that the 1st, 2nd and 3rd defendants do pay the costs of the plaintiff as taxed by the Officer of the Court."

It appears that the draft of this Order was submitted to *Mr. Cumarasami* who initialled it as correct.

The first appellant arrived in Kuala Lumpur from India about the middle of February, 1940, and on the 4th March the appellants applied by motion for an order setting aside the decree of the 15th January, 1940, and extending the time for entering an appearance.

The motion was heard before the Chief Justice on the 29th March, 1940. There had been a change of solicitors, and *Mr. Shearn* now appeared for the plaintiff. He opposed the application on the ground that on the face of it the decree was *inter partes*, and that accordingly there was no jurisdiction in a Court of first instance to set it aside. This contention prevailed, and the motion was dismissed with costs. The order specially provided that such dismissal should be without prejudice to any application which the present appellants might make to the Court of Appeal for extension of time to appeal or to obtain other relief.

The present appeal is the appeal of the appellants against the order of the Chief Justice. As a further precaution, the appellants also filed a motion for extending the time for appealing against the decree passed by Gordon-Smith, J., and filed an appeal (No. 5/40) against the decree. On the hearing of the present appeal counsel agreed that, if the appeal against the order of the Chief Justice were allowed and the decree were set aside, the Court could also deal with the motion and Appeal 5/40 without hearing further argument.

Mr. Shearn contended that the decree as passed constituted ae *estoppel*. He admitted that there was no jurdisdiction to give judgment *inter partes* without hearing evidence, and that no doubt an application might have been made to rectify the decree under the provisions of section 222 (iii) of the Civil Procedure Code, or an appeal might have been lodged against the decree itself, but that, as neither of these courses had been followed, the form of the decree was conclusive, and that the Court could not go behind it.

The argument is, therefore, that the decree has created an estoppel by record. It is, however, abundantly clear from the authorities (*see Hailsham* Vol. 13, page 441, paragraphs 496 *seqq.*), that no estoppel arises as to matters which were not in issue in the proceedings, the record of which is relied on. The decree is only part of the record, and the whole record must be looked at to discover what was in issue. If the record is examined it is abundantly clear that the application was for a judgment in default, that no evidence was called, that the defendants had entered no appearance and presented no argument. The decree, being a judgment in default obtained under the provisions of sub-rules 34 to 36, the provisions of sub-rule 40 are properly applicable. The argument, therefore, that the appellants are estopped by the record is clearly unsustainable.

It appears to me that the same conclusion must be reached if the Court confines itself to examining the decree alone. The decree states that counsel for the defendants was heard. As he had not entered an appearance he had no right of audience, and possibly it would have been more correct to have omitted his name, but *Mr. Cumarasami* is an officer of the Court, and although not technically before the Court, having obtained that very day some instructions from his clients, it was his duty to appear and inform the Court of the position. The decree merely states that the Court had "heard" *Mr. Cummarasami* which was correct. The recital, however, of the reading of the certificate of non-appearance negatives the suggestion that the appellants were properly before the Court. There is no recital that any evidence was recorded or that there was a judgment by consent. Admittedly there was no jurisdiction to make a final decree *inter partes* without hearing evidence, or recording a consent. The most that can be urged is that the decree is equivocal. On the principle "*Omnia praesumuntur rite esse acta*" the Court may confidently presume that the learned Judge did not exceed his jurisdiction, but gave the plaintiff the judgment to which he was apparently entitled and which the Court had jurisdiction to make, namely a judgment in default.

If *Mr. Cumarasami* had taken part in the argument and had had time to file and read affidavits in reply, that might have influenced the Court on a

subsequent application to refuse to exercise its discretion to set the decree aside, but even so, it would not have converted a default judgment into a judgment *inter partes,* and the matter would still have been properly dealt with by an application under sub-rule 40 and not by way of appeal [see *Boyle v. Sacker*[4]].

On the technical point of procedure the appellants are therefore entitled to succeed. It appears, however, that on the hearing before the learned Chief Justice, the plaintiff was not heard on the merits, and, so as to avoid remitting the matter, the Court agreed to rehear the original motion.

On this aspect of the case the question of service is of importance.

If the appellants were properly served they could only get an order setting aside the decree if they could give an adequate explanation for not having entered an appearance, and if they could show merits and then only upon such terms, as to costs or otherwise, as the Court might think just. On the other hand, if they were not properly served, they would be entitled to have the decree set aside *ex debito justitiæ.*

The question of service is regulated by Chapter VII of the Civil Procedure Code sections 56-90. Service is *prima facie* personal *(see* sections 69, 71, 72 and 73). Where a defendant is resident in India the summons may be sent to a Court in India for service under the provisions of section 86, but I can find nothing to suggest that such service must not also be personal. This view is supported by the provisions of section 81 (substituted service). Normally substituted service can only be directed when the defendant is in the jurisdiction but keeping out of the way. Where, however, the summons is in a suit relating to immovable property (which is the case here), an order can be made for substituted service out of the jurisdiction under the provisions of sub-sections 81 (v) and 81 (vi). No special directions for service were, however, given in the order of the 8th August, 1939, nor was a supplemental order asked for when personal service could not be effected. In my opinion, therefore, the service on the appellants not having been personal, was *prima facie* bad.

It is argued, however, under section 78 of the Civil Procedure Code, where personal service cannot be effected, the summons can be served by affixing a copy of the summons on the outer door of the defendant's house, a procedure which according to the evidence was followed on the 5th November, 1939. It is to be observed, however, that section 78 merely directs the process-server what he is to do. It does not say that such service is *ipso facto* equivalent to personal service. On the contrary, section 80 provides that the Court may examine the affidavit of service and the serving officer and may make such further enquiry as it thinks fit. The last portion of the section is mandatory—"and shall either declare that the summons has been duly served or order such service as it thinks fit". The service under section 78 is a form of substituted service, and section 80 makes it clear that such service shall only be good service if the Court so directs. That in effect is certainly consistent with the principles of English law under which the object of substituted service, as of direct personal service, is to bring the proceedings to the notice of the person being served, and there must be a reasonable probability that this object will be achieved. The procedure of "constructive service" is unknown under English law, and is equally inapplicable in the Federated Malay States [see *In re a Judgment Debtor* [1], followed in *In re Cespedes*[3]].

Provisions similar to sections 78 and 80 appear in the Indian Code of Civil Procedure (Order V, rules 17 and 19), but I doubt whether a consideration of these rules is relevant, since in a Selangor suit the service must be regulated by the Civil Procedure Code of the Federated Malay States, and it must be for the Courts of the Federated Malay States to decide, by making a declaration under section 80, whether the summons has been duly served by having been brought to the defendant's notice.

In making such declaration the Court will take into consideration the endorsement which by section 86 is required to be made by the Judge or other officer of the Court in India that the summons has been duly served, such endorsement not being conclusive but merely evidence upon which the Court in the Federated Malay States can act. No such endorsement was ever made, and I doubt therefore whether the Court here was ever in a position to make the declaration contemplated by section 80. It is not here necessary to decide the point as no declaration was ever made. Technically, therefore, the summons was never served at all and the jurisdiction to give judgment in default never arose.

The decree must accordingly be set aside *ex debito justitiæ.* It is not, therefore, necessary for me to consider the merits though I am by no means satisfied that there is not a substantial issue to be tried. So far as the plaintiff is concerned, he would obviously have been well advised on the hearing before Gordon-Smith, J., to have consented to a reasonable adjourn-

ment upon *Mr. Cumarasami's* undertaking to enter an appearance. A summons for directions could then have been issued, and an order made for the filing of the written statements, and the action might now be ready for trial. The plaintiff, however, preferred to snatch a judgment and notwithstanding their counsel's admission that the defendants could apply under sub-rule 40 to set it aside, when this procedure was adopted, has sought to argue both before the learned Chief Justice and the Court of Appeal that the judgment was a final judgment. Such reliance on mere technicalities is inconsistent with the plaintiff's professed desire to have the issues speedily determined.

The appellants by their counsel have undertaken to enter an appearance forthwith if the decree is set aside and such undertaking will be embodied in the order.

The respondent must pay the costs of the motion to the Chief Justice and of this appeal, such costs to be taxed, but there should be a set off in respect of any costs, other than the costs of the application for judgment, which have been taxed and are payable by the appellants.

As regards the motion for extension of time, there will be no order, and Selangor Civil Appeal 5/40 will be dismissed. These proceedings were, however, properly taken as a precaution in case Civil Appeal 4/40 did not succeed and the costs of the motion and the appeal should be costs in the case. The deposit paid on both appeals should be paid out to the appellants.

Cussen, J.—I concur.

Appeal allowed with costs.

[APPELLATE CIVIL JURISDICTION]

POYSER, C.J. (F.M.S.), McELWAINE, C.J. (S.S.) & TERRELL, J.A.

January 22, 1941.

SHEIKH ABDUL SHUKOR BIN SHEIKH MUSTAPHA

(Appellant)

vs.

DOYAK BIN UYOP

(Respondent).

[SELANGOR CIVIL APPEAL No. 5 of 1940]

Civil Procedure Code, Ss. 264, 272 (1)—decree—order for payment by instalments—order made rescinding instalment order—application for attachment of decree—sale—fresh suit by judgment debtor for declaration of nullity of sale—whether suit maintainable—whether notice to judgment debtor necessary under S. 264.

The respondent was one of four judgment debtors in a suit in which the plaintiff was one M. A. Meyappa Chettiar. Judgment was entered for Meyappa Chettiar against the respondent and three others on the 3rd May 1933. Subsequently a judgment debtor summons was taken out and on the 21st June 1933 it was ordered that the respondent should pay $2/- per month. On the 7th October 1937 a summons was issued calling upon the respondent and the other defendants to shew cause why the instalments should not be increased, or, in the alternative, asking that the order against the second defendant be rescinded so as to enable the plaintiff Meyappa Chettiar to attach and sell the land belonging to the defendant in question. The Magistrate made an order on the 20th October 1937 whereby the instalment order was rescinded. On the 8th November 1937 Meyappa Chettiar applied to attach the respondent's land in the Mukim of Pasir Panjang and on the following day an attachment was ordered to issue. The property was duly put up for sale and was purchased by the appellant. The sale was duly confirmed by an order dated the 8th June 1938, and in pursuance of such order the appellant was duly registered as proprietor. On the 27th January 1939 the respondent commenced a suit claiming **inter alia** declarations that the attachment and sale were null and void and of no effect and that the appellant had acquired no right or title in the land purchased. Horne, J. gave judgment for the respondent.

Held, on appeal, (1) that the question at issue here being one which had arisen between the parties to a suit in which a decree of execution and attachment was passed and the auction-purchaser, as representative of the judgment creditor, Section 272 (1) of the Civil Procedure Code operated to make a separate suit brought in a Court, which had nothing to do with executing the decree, a nullity, and (2) that inasmuch as an application for an instalment order is an application for execution, the Proviso to S. 264 of the Civil Procedure Code applied in this case and no notice as required by the section was necessary.

Cases referred to:—

(1) *In re Watson,* (1893) 1 Q.B. 21.
(2) *Bailey v. Plant,* (1901) 1 K.B. 31.
(3) *Bundy v. Motor Cab Owners Drivers Association,* (1930) 143 L.T. 334.
(4) *Stephen v. Vallipuram,* (1931) 2 F.M.S.L.R. 49.
(5) *Thamotharan Pillay v. Velupillay,* (1933-4) F.M.S.L.R. 383.
(6) *Ahna Moona Muthuraman Chettiar v. K. N. Nair,* 7 M.L.J. 177.
(7) *A. L. Velathan v. Chinniah,* 8 M.L.J. 34.
(8) *Rex v. Dennis,* 40 T.L.R. 420.
(9) *Prosunno Coomar Sanyal v. Kasi Das Sanyal,* 19 I.A. 166.
(10) *R. G. Sabapathi Pillai v. Tham Hing Kwai,* (1935) F.M.S.L.R. 1.
(11) *R. G. Sabapathi Pillai and Raja Singam v. Tham Hing Kwai,* N.S. Civil Appeal No. 5 of 1935 (unreported).
(12) *Taylor v. Taylor,* (1875) 1 Ch. 426.